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UNITED STATES SUPREME COURT UPHOLDS INDIANA MINERAL LAPSE STATUTE

MINING AND MINERAL INTERESTS—TERMINATION: In a 5-4 decision, the U.S. Supreme Court holds Indiana's Dormant Mineral Interests Act constitutional. Severed mineral interests not "used" for a period of twenty (20) years shall automatically revert to the current owner of the surface property, unless the mineral interest owner files a statement of claim in the local county recorder's office. *Texaco, Inc. v. Short*, 102 S. Ct 781 (1982).

INTRODUCTION

A critical issue arising during the oil shortage of the 1970s and continuing today is the need to develop domestic mineral resources, primarily oil and gas. Increased mineral production can be significantly hindered when the owners of "severed mineral interests"¹ become fractionalized and cannot be located.² Many state recording statutes have proven ineffective because they do not require further periodic recording of transferred mineral interests. This difficulty in locating the owners of fractionalized mineral interests has hindered and even foreclosed efforts to develop many promising mineral properties.

Many states enacted new statutes to facilitate the production of properties which have severed mineral interest owners.³ The underlying purpose of each statute was to eliminate unknown or unlocatable owners of severed mineral interests whose absence severely inhibited the development of the property. These statutes terminated the ownership rights of the severed mineral interests owner unless statutory conditions were met. The conditions included: 1) production within a certain number of years, 2) payment of taxes, 3) payment of rents or royalties, or 4) recording a claim of right or interest unless one of the above requirements has been satisfied within a given number of years.⁴ Most states also provide for a

1. Severed mineral interest is defined as title to the mineral interest in property which has been separated from title to the surface interest in that property. See 8 H. WILLIAMS and C. MEYERS, *OIL AND GAS LAW, MANUAL OF OIL AND GAS TERMS* 692 (1982).

2. Interests may become fractionalized by being divided among several persons in attempts to spread the cost of their acquisition or to limit the risks assumed by each individual. Interests may also become fractionalized as their owners sell portions of them for profit as opposed to profiting from the development and sale of the oil. Distributions following the death of an interest holder also tend to create fractional interests owned by a number of heirs. See Kuntz, *Old and New Solutions to the Problem of the Outstanding Undeveloped Mineral Interest*, 22 *INST. ON OIL & GAS L. & TAX'N* 81 (1971).

3. FLA. STAT. ANN. § 704.05 (West 1975); ILL. ANN. STAT. ch. 30, § 197 (Smith—Hurd Supp. 1983); IND. CODE ANN. §§ 32-5-11-1 thru 32-5-11-8 (Burns 1971); MICH. COMP. LAWS ANN. § 554.291 (West 1967); MINN. STAT. ANN. § 93.52 (West 1977); NEB. REV. STAT. §§ 57-288 thru 57-291 (1978); WIS. STAT. ANN. § 700.30 (West 1981).

4. See statutes cited *supra*, note 3.

grace period of two (2) to five (5) years before the statutes become effective.⁵ The grace period was to allow citizens to become familiar with the laws and file their claims of right if necessary.

Constitutional challenges to these mineral lapse statutes quickly followed.⁶ The arguments raised against the lapse statutes included the following: 1) legitimate state goals were not properly accomplished by the statutes, 2) property was being taken without just compensation, 3) the obligations of contracts were impaired, 4) property rights were extinguished without proper notice, and 5) violations of the equal protection clause existed.⁷ Prior to the Supreme Court's acceptance of the appeal in *Texaco Inc. v. Short*,⁸ only two states, Michigan and Indiana, had upheld their statutes against these challenges.⁹

THE INDIANA SUPREME COURT UPHOLDS ITS MINERAL LAPSE STATUTE

The Indiana Dormant Mineral Interest Act¹⁰ was passed by the Indiana Legislature in 1971. The Act provides that severed mineral interests would automatically revert to the current surface owner of the land unless one of the following conditions was met:

1. Sufficient "use" of the mineral interest by the owner. "Use" was defined to include actual or attempted production of minerals, payment of rent or royalties, or the payment of taxes within a twenty year period;
2. Filing a statement of claim in the local county recorder's office within the twenty year "non-use" period;
3. Owning ten or more mineral interests in the same county and inadvertently omitting to file a statement of claim within the required period.¹¹

The statute provided for a two year grace period before it became effective so that interested parties would have sufficient time to familiarize themselves with the new law and take appropriate action to preserve their mineral interests.

The plaintiffs in *Texaco v. Short* failed to file a "statement of claim" within the two year grace period and had not "used" their severed mineral

5. *Id.*

6. *Wilson v. Bishop*, 82 Ill. 2d 364, 412 N.W.2d 522 (1980); *Wheelock v. Heath*, 201 Neb. 835, 272 N.W.2d 768 (1978); *Short v. Texaco, Inc.*, 406 N.E.2d 625 (Ind. 1980); *Contos v. Herbst*, 278 N.W.2d 732 (Minn. 1979); *Chicago & North Western Transportation Co. v. Pederson*, 80 Wis. 2d 566, 259 N.W.2d 316 (1977); *Van Slooten v. Larsen*, 410 Mich. 21, 299 N.W.2d 704 (1980).

7. See cases cited, *supra*, note 6.

8. 102 S. Ct. 781 (1982).

9. *Short v. Texaco, Inc.*, 406 N.E.2d 625 (Ind. 1980); *Van Slooten v. Larsen*, 410 Mich. 21, 299 N.W.2d 704 (1980).

10. IND. CODE ANN. §§ 32-5-11-1 thru 32-5-11-8 (Smith—Hurd Supp. 1983).

11. *Id.*

interest during the previous twenty year period. According to the statute, therefore, their title automatically reverted to the owners of the surface estate. Each plaintiff brought a separate action to declare the statute unconstitutional and void the transfer of the mineral interest to the surface owner. The cases were consolidated in the circuit court and a judgment was entered which declared the Mineral Lapse Act unconstitutional.

In an opinion written by Justice DeBruler, the Supreme Court of Indiana reversed the circuit court and upheld the Mineral Lapse Act.¹² The court found that: 1) the Act addressed a legitimate state interest, 2) the legislature had the power and authority to effectuate this interest, and 3) the legislature did not unconstitutionally violate state or federal equal protection, contract, eminent domain, or due process requirements.

The legitimate state interest furthered by the Act was the facilitation of mineral production by remedying uncertainties in titles. The legislature believed that "stale and abandoned interests created uncertainties in titles and constitutes an impediment to the development of mineral interest that may be present."¹³ Mineral properties on which there had been no display of activity or interest for a period of twenty years were to be considered "mischievous and contrary to the economic interest and welfare of the public."¹⁴ Such interests were considered abandoned unless the owners took affirmative action to preserve them by filing a claim in the county recorder's office.

The power of the legislature to place restrictions on the owners of mineral interests was held to be inherent in the state's "police powers." In *Forman v. State ex rel. Department of Natural Resources*,¹⁵ the Indiana court upheld the enactment of laws, within constitutional limits, to "promote order, safety, health, morals and the general welfare of society."¹⁶ The restrictions placed upon the police power required that the "method and means used to protect the public order, health, morals, safety or welfare must have some reasonable relation to the purpose or end sought."¹⁷ The *Short* court's determination, therefore, was that the lapse statute actually promoted the general welfare of society, the methods chosen to achieve this purpose were reasonable and the statute was a justifiable exercise of the state's police power.

The Mineral Lapse Act distinction between owners of more than ten severed mineral interests and owners of less than ten interests was held to be rational by the Indiana Supreme Court and not in violation of the Fourteenth Amendment (equal protection), or Article I, Sec. 23, of the

12. *Short*, 406 N.E.2d 625 (Ind. 1980).

13. *Id.* at 627.

14. *Id.*

15. 387 N.E.2d 455 (Ind. App. 1979).

16. *Id.* at 460.

17. *Id.*

Indiana Constitution. "The Legislature could reasonably have concluded that those meeting the criteria set forth above (owners of more than ten interests) include those most likely to assemble such interests and actually produce minerals."¹⁸ Owners of multiple interests would be the parties most likely to produce the minerals and exempting them from inadvertent failures to file claims of right rationally promoted the objectives of the statute. Such a classification was not suspect or arbitrary and the court ruled that it complied with the fair and substantial relation test applicable under these circumstances.

The Indiana court resolved the issue of whether contracts were unconstitutionally impaired by comparing the lapse statute with statutes of limitation and adverse possession statutes which arguably impair contracts as well. The court ruled that "the objectives were valid and similar to those served by acts of limitation and the law of adverse possession."¹⁹ Although state statutes may impair contracts, the court recognized that certain statutes must take priority in order to protect the police power.

The major issue addressed by the Indiana Supreme Court was whether the Mineral Lapse Act violated due process notice requirements. The Indiana court upheld the Legislature's determination that notice was sufficient to all interested parties. The court relied upon the enactment of the statute and the availability of a two year grace period enabling citizens to become familiar with the new law as sufficient notice. Authority for this position was based upon cases such as *Anderson National Bank v. Lueckett*,²⁰ *Terry v. Anderson*,²¹ and *Wilson v. Iseminger*²² which support the termination of property interests based upon the use of statutory notice with a grace period rather than stricter forms of actual notice.²³ The court again analogized the Mineral Lapse Act to statutes of limitation and adverse possession laws. The court noted that "under the statute of limitations and the law of adverse possession a fee simple title to land is terminable."²⁴ "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect . . ."²⁵ The Short court, therefore, linked the similarities between the Mineral Lapse Act, statutes of limitation, and statutes of adverse possession together to legitimize the Legislature's granting of statutory notice rather than stricter forms of notice.

18. *Short*, 406 N.E.2d at 632.

19. *Id.* at 630.

20. 321 U.S. 233 (1944).

21. 95 U.S. 628 (1877).

22. 185 U.S. 55 (1902).

23. *Short*, 406 N.E.2d at 629-30.

24. *Id.* at 629.

25. *Id.* at 630.

THE U.S. SUPREME COURT UPHOLDS THE MINERAL
LAPSE STATUTE

Upon appeal by the mineral interest owners, the U.S. Supreme Court, in a 5-4 decision, upheld the Indiana Mineral Lapse Statute stating: 1) Indiana had the power to enact the statute and it furthered legitimate state goals; 2) The Act did not take property without just compensation; 3) The Act did not impair the obligation of contracts; 4) The Act did not extinguish property rights without adequate notice; and 5) The Act's exceptions did not violate the equal protection clause.²⁶ The major focus of the Court's opinion was the legitimacy of the statute, equal protection, and notice.

The majority agreed that the Mineral Lapse Act was a proper exercise of the state's police power and that it furthered legitimate state interests. The Court stated that, "just as a state may create a property interest that is entitled to constitutional protection, the state has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest."²⁷ This position emulated that of the Indiana court in that it analogized the Mineral Lapse Act to a statute of limitation and an adverse possession statute. The Court also relied on Supreme Court decisions such as *Wilson v. Iseminger*,²⁸ *Terry v. Anderson*,²⁹ *Hawkins v. Barneys Lessee*,³⁰ and *Jackson v. Lamphire*,³¹ as authority for their position. By accepting the theory that the Mineral Lapse Act was analogous to a statute of limitation the Supreme Court was able to legitimize the termination of severed mineral interests as a valid exercise of the state's police power.

The theory that the Indiana Legislature properly exercised its police power to facilitate a legitimate state interest was applied to dispel the equal protection argument made by the appellant. The majority gave blanket approval to the state court's analysis of the issue and stated that giving owners of ten or more mineral interests actual notice before their interest lapsed, as opposed to automatic lapse for owners of less than ten mineral interests, was "unquestionably legitimate."³²

The final analysis focused on the issue of notice. The majority ruled that a two year grace period following the enactment of a statute was not "so unprecedented and . . . constitutionally inadequate"³³ as to fail to

26. *Texaco, Inc. v. Short*, 102 S. Ct. 781 (1982).

27. *Id.* at 790.

28. 185 U.S. 55 (1902).

29. 95 U.S. 628 (1877).

30. 30 U.S. 457 (1831).

31. 3 Pet. 280 (1830).

32. *Texaco*, 102 S. Ct. at 797.

33. *Id.* at 793-794.

protect citizens from "the silent actions of the legislature."³⁴ Once again, the majority cited statute of limitation cases such as *Anderson*,³⁵ *Jackson*,³⁶ and *Wilson*³⁷ to distinguish the notice requirements in the Indiana Lapse Act from the stricter notice requirements which had been established by more recent decisions such as *Mullane v. Central Hanover Bank & Trust Co.*,³⁸ *Covey v. Somers*,³⁹ *Walker v. Hutchinson*,⁴⁰ and *Fuentes v. Shevin*.⁴¹ The majority distinguished the stricter notice requirement cases by stating "it has never been suggested that each citizen must in some way be given specific notice of the impact of a new statute on his property before that law may affect his property rights."⁴²

ANALYSIS

The following analysis of the U. S. Supreme Court decision in *Texaco Inc. v. Short* is divided into three sections. The first analysis focuses on the classification of severed mineral interests as applied in this case. The second analysis addresses the issues focused upon the majority, i.e., the taking of private property without just compensation, equal protection, and notice. The final analysis will address the effectiveness of the Mineral Lapse Act in carrying out the legitimate state interest to increase mineral production.

By the enactment of the Mineral Lapse Statute, the Indiana Legislature wanted to create an equitable means of facilitating the development of severed mineral interests. Although the Indiana court indicated that it was unsure exactly what property classification to label severed mineral interests, it did recognize them as vested interests in real estate entitled to the same protection as fee simple interests.⁴³ Such an interpretation was correct in one sense but confusing in another.

The classifications for property interests in surface estates are different than classifications for sub-surface estates. Sub-surface interests in a mineral estate are classified as either corporeal or incorporeal in character. An incorporeal interest is defined as "a non-possessory" interest in real property, while a corporeal interest is defined as a "possessory" interest in real property. A number of states regard severed interests in minerals,

34. *Id.* at 794, 802.

35. 95 U.S. 628 (1877).

36. 3 Pet. 280 (1830).

37. 185 U.S. 55 (1902).

38. 399 U.S. 306 (1950). (Notice by publication under state small trust pooling statute disallowed.)

39. 351 U.S. 141 (1955). (Notice of foreclosure to incompetent rather than to a guardian held invalid.)

40. 352 U.S. 112 (1956). (Notice by publication under state condemnation statute held invalid.)

41. 407 U.S. 67 (1971). (Prejudgment replevin statute without prior notice to owner disallowed.)

42. *Texaco*, 102 S. Ct. at 795.

43. *Short*, 406 N.E.2d at 627.

created by deed or lease, as incorporeal interests, also known as "profits a prendre."⁴⁴ Previous decisions indicate that the Indiana courts have adopted this non-ownership theory and classify severed minerals interests as incorporeal in character.⁴⁵ The Indiana Supreme Court, however, never addressed the corporeal versus incorporeal distinction, but simply classified severed mineral interests as real property rather than as personal property.⁴⁶ The difference between the two classifications should be noted. "The classification of an interest in minerals (or the proceeds thereof) as real property or as personal property is a question separate and distinct from the classification of the interest as corporeal or incorporeal. The former classification is made on the basis of duration, the latter on its possessory nature. Nevertheless, the two questions of classification have sometimes been confused."⁴⁷ The misunderstanding of the proper classification for mineral interests in Indiana ultimately hindered the *Short* court in its analysis.

The Indiana Supreme Court inappropriately gave Indiana's severed mineral interests more protection than such interests are entitled. Once the court declared these interests to be vested interests entitled to the same firm protection as fee simple interests in the surface, they had to analogize the Mineral Lapse statute to abandonment statutes and statutes of limitation in order to legitimize its effects. Fee simple interests in surface estates are terminable only by strict compliance with adverse possession statutes. The Mineral Lapse Act, however, does not require the surface owner to comply with any of the elements of adverse possession because it was not designed to be an adverse possession statute.⁴⁸ The Mineral Lapse Act is an abandonment statute, not an adverse possession statute. Neither the Indiana nor U.S. Supreme Court recognized the fact that fee simple interests in surface estates can *only* be involuntarily terminated when *affirmative* action has been initiated by another party. If severed mineral interests are to receive the same protection as fee simple interests in surface estates, as stated by the Indiana Supreme Court,

44. 8 H. WILLIAMS and C. MEYERS, OIL AND GAS LAW, *Manual of Oil and Gas Terms*, 354 (1982). (Note that the majority of jurisdictions classify severed mineral interest as corporeal.)

45. See *Halbert v. Hendrix*, 121 Ind. App. 43. 95 N.E.2d 221 (1950); *Ohio Oil Co. v. Indiana*, 177 U.S. 190 (1900).

46. "If the interest had a duration of freehold estate, it was real property or real estate; if it had the duration of a non-free hold estate, it was a chattel real, a personal property interest in land." 2 H. WILLIAMS and C. MEYERS, OIL AND GAS LAW, *Creation and Transfer of Property Interests*, § 212, at. 130.2 (1982).

47. *Id.* at 131.

48. The elements of adverse possession may include: actual, open, notorious, exclusive, continuity, claim of right, color of title, and payment of taxes. These requirements rest on the policy judgment that existing rights in land should not be lost without the owner being put on guard sufficiently to enable him to take preventative action by acting with reasonable promptness. See, 7 R. POWELL & P. ROHAN, *POWELL ON REAL PROPERTY*, 709-762.16 (1982).

then they should only be subject to abandonment by affirmative judicial action or by meeting the elements of adverse possession. The Mineral Lapse Act's failure to provide this protection points out an error in the courts analysis.

Proper classification of severed mineral interests as incorporeal would have simplified the Indiana court's analysis and provided the court with a stronger argument to support the termination of severed mineral interests.⁴⁹ Severed mineral interests in Indiana are incorporeal.⁵⁰ "In states which classify a mineral interest or leasehold interest as incorporeal in character, it has been held that such interests may be extinguished by abandonment."⁵¹ Abandonment "is usually defined as non-use for a period of time coupled with an intent on the part of the owner to give up or extinguish the interest. Although intent is a necessary element of abandonment, such intent may be implied in appropriate cases from long continued non-use."⁵² By applying the abandonment doctrine to Indiana's Mineral Lapse Statute it is reasonable to conclude that severed mineral interests were previously subject to abandonment in Indiana and should not have been declared to deserve the same protection as fee simple interests in surface estates. The effect of the Mineral Lapse Act was simply to specify the period of non-use by the owner of a severed mineral interest which would qualify that interest as abandoned.

The issue of whether the Mineral Lapse Statute effected a taking of private property for public use without just compensation to the owner should be examined. The vast majority of the surface interests in real property are owned by either the state or federal government. Many severed mineral interests which statutorily reverted to the owner of the surface estate actually reverted to a state or federal government. The Mineral Lapse Act effectively reverted mineral interests back to the public without compensating the original owner. Neither the Indiana nor the U.S. Supreme Court addressed the issue in this light. Both courts stated that it is the owner's failure to act and *not* the action of the state that causes the lapse in the property right.⁵³

49. See *Gerhard v. Stephens*, 68 Cal. 2d 864, 883-886, 69 Cal Rptr. 612, 628-630, 442 P.2d 692, 708-710 (1968). A proper distinction between fee interests and incorporeal interests was made by the California court in that case. "Cases using 'fee interest' in describing an incorporeal hereditament refer only to its duration and do not hold that it cannot be abandoned . . . To summarize we look to the 'nature' of the interest as well as its 'duration' to define the plaintiff's rights. Incorporeal interests, as distinguished from corporeal ones, may be abandoned, whatever their life, whether limited or unlimited in time, whether 'fee' or a term, whether perpetual or restricted. In short, the temporal life of the hereditament does not tell us for this purpose what 'kind' of a legal interest it is; we must classify it according to its genus, not merely its duration characteristics."

50. See *supra* note 45.

51. I H. WILLIAMS and C. MEYERS, *OIL AND GAS LAW, Creation and Transfer of Property Interests*, § 210.1, at 109 (1982).

52. *Id.*

53. *Texaco, Ind. v. Short*, 102 S. Ct. at 792; *Short v. Texaco, Inc.*, 406 N.E.2d at 631.

Both courts' analyses of whether the Mineral Lapse Act violates the equal protection clause of the Fourteenth Amendment should be examined. The statute requires actual notice to an owner of ten or more mineral interests before one of his interests may lapse due to the owner's inadvertence. Both courts justified this unequal treatment by asserting that it promoted the legitimate state interest of encouraging multiple ownership and increasing the likelihood of actual production.⁵⁴ This "legitimate" state interest, however, has questionable foundation. Oil companies drill for oil based upon encouraging geological surveys and other data. If the surveys are unfavorable, the company will not engage in any type of production activity regardless of how many property interests are held by the mineral interest owner. Single or multiple ownership does not enter into this initial production decision. An accurate analysis of the "ten mineral interest exception" may disclose that major oil interests lobbied for this exception to protect themselves from the lapse of their severed mineral interests before receiving actual notice. Further inquiry to determine the owners of more than ten severed mineral interests in Indiana's counties might well verify this assumption. Legitimacy should not be founded upon the strength of one group's ability to influence legislation. Conformity with the underlying principles actually being promoted should be the standard by which legislation is upheld as legitimate. Where obvious discrepancies exist a court should scrutinize the legislature's actions more carefully.

The analysis of the notice requirement to the owners of severed mineral interests is the issue in both the Indiana and the U.S. Supreme Court decisions which should be most seriously questioned. It is true that a distinction can and should be made between notice of judicial actions and notice of legislative actions. The enactment of a statute which greatly affects a real property right, however, should be fair and rational.⁵⁵ Circumstances must be recognized to exist where a state simply cannot rely upon the maxim that a man is presumed to know the law.⁵⁶ Reliance simply upon the passage of time, be it two years or ten years, should never be enough to legitimize a failure to give more effective notice to those being improperly damaged when it is reasonable to inform them by other means. Both courts recognized that real property rights deserve the utmost protection of the law.⁵⁷ Notice by self-executing statute and a grace period simply was not the firmest protection available under the law. Termination of real property interests deserves more than a self-executing statute, especially where stricter forms of notice are reasonably

54. 102 S. Ct. at 797; 406 N.E.2d at 631-632.

55. *Vlandis v. Kline*, 412 U.S. 441 (1973).

56. *Lambert v. California*, 355 U.S. 225 (1957).

57. *Short v. Texaco, Inc.*, 406 N.E.2d at 627.

available, more equitable, and provide a much higher degree of protection to affected parties.

The legitimate state interest used to support the Mineral Lapse Act should be examined. The Indiana Supreme Court stated that the statute would encourage mineral interest owners to develop their interests and to enhance the collection of property taxes.⁵⁸ Arguably, however, this policy will not be effective in many situations and may in fact prove to be detrimental to the development of many severed mineral interests. Oil companies will be uneasy about drilling on property in which the surface owner claims the minerals have reverted back to the surface estate unless it can be absolutely verified that the property has not been "used" for twenty years and the surface owner's reversion is legitimate. The possible uncertainties of title created by the Mineral Lapse Statute may make it just as difficult for an oil company to drill today as it was prior to the enactment of the statute. Numerous legal battles over the ownership of severed minerals interest will also slow up the opportunity to increase production.

CONCLUSION

The Mineral Lapse Act should not have been upheld by the U.S. Supreme Court. The inequitable aspects of the statute provide an unacceptably low level of protection for property rights which are not adequately justified by the underlying state goals. Indiana is allowed to create an abandonment statute for its incorporeal severed mineral interests, but property owners deserve protection under the law which is both equal and equitable. The U.S. Supreme Court should not have compromised such an important interest on a state statute which provides minimal notice as well as a loop-hole for the major oil interests.

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58. *Id.* at 631-632.